

APR 25 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

STUART ROMM,

Defendant - Appellant.

No. 07-10137

D.C. No. CR-04-00216-PMP

MEMORANDUM *

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted January 15, 2008
San Francisco, California

Before: WALLACE and SCHROEDER, Circuit Judges, and BENITEZ **,
District Judge.

Romm appeals from the district court's order sentencing him to serve a
mandatory minimum sentence of 180-months imprisonment with a concurrent
mandatory minimum term of 120-months imprisonment, arguing the district court

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Roger T. Benitez, United States District Judge for the
Southern District of California, sitting by designation.

erred when it determined Romm's prior state convictions triggered an increased mandatory minimum sentence, and when it failed to merge his possession and receipt offenses at sentencing. We affirm.

Romm argues the district court erred when it relied on a probable cause affidavit to determine that his Florida conviction was a predicate offense. He is mistaken. A police report may be a qualified document for modified categorical analysis if the report was attached to, and incorporated by reference into, the criminal complaint and if the defendant stipulates at the plea hearing to the facts listed in the report. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1131-33 (9th Cir. 2006). Here, the affidavit was attached to the charging papers, and the plea transcript demonstrates that Romm stipulated to the facts contained in the affidavit and agreed to incorporate by reference the affidavit into the plea. Thus, the district court properly relied on the affidavit.

Additionally, that Romm pleaded *nolo contendere* is of no moment; a *nolo contendere* plea is the equivalent of a guilty plea for modified categorical analysis purposes. *See United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1197-98 (9th Cir. 2006).

Contrary to Romm's arguments, unlike the charging papers in *United States v. Almazan-Becerra*, 482 F.3d 1085, 1089-90 (9th Cir. 2007), the affidavit here did

not allege multiple elements in the disjunctive, and Romm was charged for the two crimes in the conjunctive. Additionally, because the probable cause affidavit supplied no factual basis for his conviction under Florida Statute section 827.071(3) other than the transmission of child pornography, which is a predicate offense, the affidavit shows that he was necessarily convicted of a predicate crime. *See United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc).

Finally, Romm contends that the district court erred when it sentenced Romm for both the receipt and the possession of the same child pornography when the government never alleged that the counts derived from separate acts. This argument is waived because Romm could have raised it in his first appeal, but did not do so. *See United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003); *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998); *see also United States v. Romm*, 455 F.3d 990 (9th Cir. 2006).

Romm's Motion to Modify Case Caption or, in the Alternative, to Issue an Unpublished Disposition is denied as moot.

AFFIRMED.